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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**

10 SAMUEL GRAHAM,

11 Petitioner,

12 vs.
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14 RALPH M. DIAZ,

15 Respondent.
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CASE NO. 12CV1689 JLS (NLS)

**ORDER (1) ADOPTING REPORT
AND RECOMMENDATION; (2)
GRANTING RESPONDENT'S
MOTION TO DISMISS; (3)
DENYING PLAINTIFF'S MOTION
TO RESTORE EQUITABLE
TOLLING; (4) DISMISSING
PETITION FOR HABEAS CORPUS
WITH PREJUDICE; AND (5)
DENYING CERTIFICATE OF
APPEALABILITY**

(ECF No. 9, 18, 19)

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19 Presently before the Court is Respondent Ralph M. Diaz's ("Respondent")
20 Motion to Dismiss Petition for Writ of Habeas Corpus Because Petition is Untimely,
21 (ECF No. 9), Petitioner Samuel Graham's ("Petitioner") Motion to Restore Equitable
22 Tolling, (ECF No. 18), and Magistrate Judge Nita L. Stormes's Report and
23 Recommendation ("R&R") advising this Court to grant Respondent's motion, deny
24 Petitioner's motion, and dismiss Petitioner's habeas corpus petition with prejudice,
25 (R&R, ECF No. 19).

26 Federal Rule of Civil Procedure 72(b) and 28 U.S.C. § 636(b)(1) set forth a
27 district court's duties in connection with a magistrate judge's R&R. The district court
28 must "make a de novo determination of those portions of the report to which objection

1 is made,” and “may accept, reject, or modify, in whole or in part, the findings or
 2 recommendations made by the magistrate judge.” 28 U.S.C. § 636(b)(1); *see also*
 3 *United States v. Raddatz*, 447 U.S. 667, 673–76 (1980); *United States v. Remsing*, 874
 4 F.2d 614, 617 (9th Cir. 1989). In the absence of timely objection, however, the Court
 5 “need only satisfy itself that there is no clear error on the face of the record in order to
 6 accept the recommendation.” Fed. R. Civ. P. 72 advisory committee’s note (citing
 7 *Campbell v. U.S. Dist. Court*, 501 F.2d 196, 206 (9th Cir. 1974)).

8 Here, Petitioner has failed to file timely objections to Magistrate Judge Stormes’s
 9 R&R. Having reviewed the R&R, the Court finds that it is thorough, well reasoned, and
 10 contains no clear error. Accordingly, the Court hereby (1) **ADOPTS** Magistrate Judge
 11 Stormes’s R&R, (2) **GRANTS** Respondent’s motion to dismiss Petitioner’s habeas
 12 petition, (3) **DENIES** Petitioner’s motion to restore equitable tolling, and (4)
 13 **DISMISSES** Petitioner’s habeas corpus petition **WITH PREJUDICE**.

14 Finally, this Court is under an obligation to determine whether a certificate of
 15 appealability should issue in this matter and the Court must “indicate which specific
 16 issue or issues satisfy the standard for issuing a certificate, or state its reasons why a
 17 certificate should not be granted.” *United States v. Asrar*, 116 F.3d 1268, 1270 (9th
 18 Cir.1997); *see also* Fed. R.App. P. 22(b). A COA is authorized “if the applicant has
 19 made a substantial showing of the denial of a constitutional right.” 28 U.S.C. §
 20 2253(c)(2). Where, as here, a petition is dismissed on procedural grounds without
 21 reaching the prisoner’s underlying constitutional claim, a COA “should issue if the
 22 prisoner can show: (1) ‘that jurists of reason would find it debatable whether the district
 23 court was correct in its procedural ruling’; and (2) ‘that jurists of reason would find it
 24 debatable whether the petition states a valid claim of the denial of a constitutional
 25 right.’ ” *Morris v. Woodford*, 229 F.3d 775, 780 (9th Cir.2000) (quoting *Slack v.*
 26 *McDaniel*, 529 U.S. 473, 484 (2000)). As both of these components are necessary to
 27 obtain a COA, the Court may resolve either issue first, but resolution of the procedural
 28 issue first has been encouraged by the Supreme Court. *Slack v. McDaniel*, 529 U.S. at

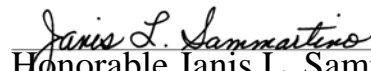
1 485; *see also Petrocelli v. Angelone*, 248 F.3d 877, 884 & n. 6 (9th Cir.2001).

2 Here, as Magistrate Judge Stormes's R&R makes clear, Petitioner's habeas
3 corpus petition was not timely filed. Although Petitioner alleges that the untimely filing
4 was the result of "egregious attorney misconduct," such that he should be entitled to
5 equitable tolling, (Pet.'s Mot. for Equitable Tolling 1, ECF No. 18), the factual
6 allegations in Petitioner's motion do not support this conclusion. Petitioner does not
7 show when he retained his attorney, whether he made any efforts to contact his attorney
8 either before or after the untimely filing of the habeas petition, or whether he requested
9 the return of his legal file from his attorney. (*See* R&R 9, ECF No. 19). In short,
10 Petitioner does not demonstrate that his attorney's misconduct made it impossible for
11 him to file the petition on time. On this showing, no reasonable jurist would find the
12 Court's dismissal of Petitioner's habeas petition to be debatable. Accordingly, the
13 Court declines to issue a certificate of appealability in this case.

14 This Order concludes the litigation in this matter. The Clerk shall close the file.

15 **IT IS SO ORDERED.**

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17 DATED: July 3, 2013

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19 Honorable Janis L. Sammartino
20 United States District Judge
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